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In the Supreme Court of the United States

October Term 1982

No.

C.B. FOODS, INC.,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether transactions between parties who are residents of the same state fall within definition of "interstate commerce" contained in the Perishable Agricultural Commodities Act where the agricultural commodities involved in those transactions did not cross state lines in connection with said transactions, but where such commodities had previously crossed state lines in connection with earlier transactions in which the party which is subject to a PACA disciplinary proceeding was not involved.

2. Whether the Secretary of Agriculture has jurisdiction over such intrastate transactions in perishable agricultural commodities.

3. Whether the "Rule of Deference" to agency construction of statute administered by such agency is applicable to the Department of Agriculture's construction of the interstate commerce provisions of the PACA.

4. Whether the "Rule of Deference" is a viable rule of statutory construction.

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UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, C. B. Foods, Inc., by counsel, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered March 29, 1982.

OPINIONS BELOW

The Judgment Order of the Court of Appeals, as yet unreported, appears at Appendix A. The July 13, 1981 Decision and Order of the Judicial Officer of the United States Department of Agriculture (Appendix C) is reported at 40 Agr. Dec. 961 (1981).

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on March 29, 1982. A petition for rehearing timely filed was denied on April 23, 1982 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves §1(3), §1(8) and §2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499(a) *et seq.*) which is hereinafter referred to as "PACA" or "Act".

1. Section 2(4) of the PACA (7 U.S.C. §499(b)(4)) provides in pertinent part:

> 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> • • •
>
> (4) For any commission merchant dealer, or broker to...fail or refuse truly and correctly to account and make full payment promptly in respect of any such commodity to the person with whom such transaction is had....

2. Section 1(3) of the PACA (7 U.S.C. §499(a)(3)) provides:

> (3) The term "interstate or foreign commerce" means commerce between a State or Territory or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.

3. Section 1(8) of the PACA (7 U.S.C. §499(a)(8)) provides:

> A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade of that commodity whereby such commodity and/or the products of such commodity are sent from one state with the exception that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another state, or for processing within the state and shipment outside the state of the products resulting from such processing. Com-

modities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

QUESTIONS PRESENTED

1. Whether transactions between parties who are residents of the same state fall within definition of "interstate commerce" contained in the Perishable Agricultural Commodities Act where the agricultural commodities involved in those transactions did not cross state lines in connection with said transactions, but where such commodities had previously crossed state lines in connection with earlier transactions in which the party which is subject to a PACA disciplinary proceeding was not involved.

2. Whether the Secretary of Agriculture has jurisdiction over such intrastate transactions in perishable agricultural commodities.

3. Whether the "Rule of Deference" to agency construction of statute administered by such agency is applicable to the Department of Agriculture's construction of the interstate commerce provisions of the PACA.

4. Whether the "Rule of Deference" is a viable rule of statutory construction.

STATEMENT

This action arises out of the Perishable Agricultural Commodities Act of 1930 (PACA), as amended, 7 U.S.C. §499(a) *et seq.* On October 30, 1972, the Respondent issued to Petitioner, pursuant to the provisions of PACA, License No. 730498, which authorized Petitioner to engage in the wholesale handling of fresh fruits and vegetables.

Petitioner, a Pennsylvania corporation, at all times material to this action maintained its principal place of business in the City of Pittsburgh, Allegheny County, Pennsylvania.

During the months of January and February, 1979, Petitioner ordered and took delivery from various sellers located in Pittsburgh, Pennsylvania, certain lots of various agricultural commodities. The Administrative Law Judge found that the number of lots of agricultural commodities ordered and delivered during this period totalled 222, having an aggregate value of $179,897.04.

All of the agricultural commodities acquired by Petitioner were purchased by it from firms located in Pittsburgh, Pennsylvania, and were delivered to Petitioner's warehouse in Pittsburgh, Pennsylvania, without traveling from, through or to any other state.

On February 26, 1979 Petitioner filed a Voluntary Petition in Bankruptcy in the United States District Court for the Western District of Pennsylvania at Bankruptcy No. 79-135. By reason of its bankruptcy, Petitioner failed to pay for the lots of agricultural commodities which it had received in January and February of 1979.

The instant action was commenced on January 25, 1980, when the Director of the Fruit and Vegetable Division, Agricultural Marketing Service, filed a Complaint against Petitioner, alleging therein that Petitioner had violated §2(4) of the PACA by failing to make full payment promptly for the lots of perishable agricultural commodities acquired by Petitioner from sellers during the period September, 1978 through February, 1979. (App. E, *infra*, 21a-38a).

On February 19, 1980, Respondent filed an answer to the Complaint which denied the alleged violation of the Act. An amended answer was filed on January 22, 1981, which asserted a number of affirmative defenses, including, *inter alia*, the alleged lack of jurisdiction of the Secretary of Agriculture to adjudicate any claims arising from intrastate transactions. (App. F, *infra*, 39a-41a).

A hearing on the Complaint was held on February 11, 1981 in Pittsburgh, Pennsylvania before the Honorable John

A. Campbell, Administrative Law Judge. On May 12, 1981, Judge Campbell filed a Decision and Order, which held that the Petitioner had committed repeated, flagrant and willful violations of §2(4) of the Act, in that it failed to pay for the lots of agricultural commodities which it had received in January and February, 1979. The Administrative Law Judge ordered that the facts and circumstances of those violations to be published.

On June 4, 1981, Petitioner filed an Appeal Petition with the Judicial Officer of the Department of Agriculture, arguing therein, *inter alia*, that the Secretary of Agriculture lacked jurisdiction over the specific transactions alleged in the Director's Complaint, since none of the transactions were in interstate commerce as that term is defined by PACA.

On July 13, 1981 the Judicial Officer filed a Decision and Order affirming the decision of the Administrative Law Judge. (App. C, *infra*, 4a-17a).

On July 31, 1981 Petitioner filed with the Court of Appeals for the Third Circuit pursuant to the provisions of 28 U.S.C. §2344, its Petition for Review of Order, requesting therein that the Court review and set aside the Decision and Order of the Judicial Officer and to order that the Complaint filed against it be dismissed. (App. D, *infra*, 18a-20a). Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §2342.

On March 4, 1982, the Petition for Review of Order was submitted to a panel of the Court of Appeals for the Third Circuit consisting of Hunter, Weis and Higginbotham, Circuit Judges pursuant to Third Circuit Rule 12(b). On March 29, 1982, the panel, per Hunter, J. issued a Judgment Order denying the Petition for Review of Order. (App. A, *infra*, 1a-2a).

Petitioner timely filed a Petition for Rehearing, which was timely denied by the Court of Appeals, per Hunter, J., on April 23, 1982. (App. B, *infra*, 3a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Extends The Jurisdiction Of The Secretary Of Agriculture Beyond Limits Permitted By The Statute

This case presents important questions concerning the jurisdiction of the Secretary of Agriculture over transactions in perishable agricultural commodities which are purely intrastate. The Court of Appeals, in affirming the decision of the Judicial Officer, has permitted the Secretary of Agriculture to extend such jurisdiction beyond the point clearly permitted by the PACA. As a result, petitioner may be subjected to the disciplinary provisions of the Act even though its activities were not within the scope of the Act.

Such ruling allows the exercise of power by the Secretary of Agriculture beyond the proper jurisdictional reach of the Act. Because the ruling will permit the Secretary to take disciplinary measures against the Petitioner for activities beyond his jurisdiction, and because no federal court has ever addressed the issue raised by Petitioner, review of the Decision below is essential.

As noted, *supra*, Respondent has found that Petitioner is guilty of violating §2(4) of the PACA in failing to make full payment promptly for certain lots of agricultural commodities which it received in January and February of 1979. The relevant portion of §2(4) provides:

> 2. It shall be unlawful in or in connection with *any transaction in interstate or foreign commerce*—
>
> * * *
>
> (4) For any commission merchant, dealer, or broker to...fail or refuse truely and correctly to account and make full payment promptly in respect of any such commodity to the person with whom such transaction is had...(Emphasis supplied).

For the purpose of the Perishable Agricultural Commodities Act the term "interstate commerce" is defined by section 1(3) of the Act (7 U.S.C. §499(a)(3)) as follows:

> The term 'interstate or foreign commerce' means commerce between a State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside.

The record below clearly establishes that the transactions in which Petitioner engaged did not result in the sellers of those commodities shipping them across state lines to Petitioner. Nor did Petitioner ship or intend to ship those commodities across state lines after it acquired the commodities. Rather, Petitioner acquired commodities which were already in Pennsylvania from Pennsylvania sellers, and it resold the commodities to Pennsylvania buyers. Thus, at first blush it would appear transactions of the sort engaged in by Petitioner do not fall within the interstate commerce provisions of §1(3) of the Act.

However, the scope of the Act's jurisdiction over interstate transactions must also be considered in light of §1(8) of the Act. Section 1(8) (7 U.S.C. §499a(8)) provides as follows:

> A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade of that commodity whereby such commodity and/or the products of such commodity are sent from one state with the exception that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another state, or for processing within the state and shipment outside the state of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being

had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

Relying on the "current of commerce" language contained in §1(8)'s supplemental or explanatory definition of interstate commerce, Respondent argued before the Court of Appeals that Congress intended the provisions of the Act to apply to any transactions involving perishable agricultural commodities, even intrastate transactions, so long as such transactions were "interwoven with the interstate commerce of the commodity." For the reasons discussed *infra*, Respondent's position is clearly erroneous.

Section 1(3) of the Act essentially provides that a transaction is in interstate commerce if it involves the shipment of commodities by a seller in one state to a buyer in another state. Both *Consolidated Citrus Company v. Goldstein*, 214 F. Supp. 823 (E.D. Pa. 1963) and *United States v. Solomon*, 3 F.R.D. 411 (E.D. Ill. 1944), involved situations contemplated by §1(3). In each of those cases the buyer bought agricultural commodities from sellers in states other than their own, causing those commodities to be shipped across state lines. In both of those cases the courts, relying on §1(3), found the transactions to have been in interstate commerce.

Section 1(8) of the Act addresses two entirely different situations. First, it provides that a transaction is in interstate commerce if the buyer purchases agricultural commodities with the intent to ship those commodities across state lines *after purchase* by the buyer. Such a transaction will be considered to be in interstate commerce even where the buyer and seller are located in the same state, so long as the parties to the transaction contemplated the out-of-state shipment of the commodities after purchase. *Krueger v. Acme Fruit Co.*, 75 F.2d 67 (5th Cir. 1935) and *Jackson v. Harrisburg Daily Market, Inc.*, 198 F. Supp. 490 (M.D. Pa. 1961), both deal with this type of situation. In both of those cases the buyers and

sellers were located in the same state, but the buyers purchased the commodities with the intention of shipping them out-of-state after purchase. In both cases the courts found the transactions to be in interstate commerce by relying on the provisions of §1(8) of the Act.

A second situation addressed by §1(8) involves parties to a transaction resorting to a "means or device" in an attempt to remove a transaction from the coverage of the Act. Such a situation confronted the court in *United States v. Klein*, 145 F. Supp. 442 (D. N.J. 1956). In that case defendent, a resident of New Jersey, suffered the suspension of his license to operate as a commission merchant. To avoid the interstate purchase of agricultural commodities, he arranged for another New Jersey resident to act as his agent to buy such commodities in New York. The Court found that the purchase of those commodities, under the arrangement between defendant and his agent, "was a purchase of commodities in interstate commerce."

The record below clearly demonstrates that the two foregoing situations did not exist with respect to the transactions in which Petitioner engaged. In the case at bar the Administrative Law Judge found, and the Judicial Officer affirmed, that C. B. Foods neither purchased the commodities involved in the subject transactions from out-of-state sources, nor did it buy them with the intent to ship them out-of-state, nor did it buy them by some means or device intended to remove the transactions from the provisions of the Act. On the contrary, the evidence clearly showed that C. B. Foods bought goods which were in Pennsylvania from Pennsylvania sellers, and it resold those goods to Pennsylvania buyers. Thus, the transactions engaged in by C. B. Foods which are alleged in the Department's complaint were definitely not within the interstate commerce definitions contained in either §1(3) or §1(8) of the Act.

Unfortunately, none of the cases cited *supra* dealt with the situation involved in the instant case, nor are there any

reported decisions by any federal court on the issue. Thus, Petitioner is without prior judicial support for its position. However, Petitioner believes that its best support may be found in the clear language of PACA.

As this Court has recently stated, the starting point in every case involving the construction of a statute is the language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 98 S.Ct. 2370, 57 L.Ed.2d 239 (1978), *cert. denied*, 449 U.S. 831 (1980). Such statutory language will control the construction of a statute where it is sufficiently clear in its context. *Touche Ross & Co. v. Redington*, 442 U.S. 560 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668, *reh. denied* 425 U.S. 986 (1976).

Petitioner submits that the language of the Act is sufficiently clear, and demonstrates that the transactions herein involved were not in interstate commerce.

2. The Decision Of The Court Of Appeals Extends The Jurisdiction Beyond The Limits Intended By Congress

This Court has often held that the duty of a court in a case calling for the construction of a statute is to ascertain the intent of Congress and to give effect to Congress's legislative will. *Philbrook v. Glodgett*, 421 U.S. 707 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975).

Prior to its passage, the Act was extensively debated in the House of Representatives. During the course of the debates, it became clear that the essential purpose of the Act was to protect shippers from unfair practices which occurred long distances from their places of business, thereby rendering their enforcement of existing legal remedies difficult, if not impossible.

The evil sought to be remedied by Congress was nonpayment for commodities shipped by sellers to distant markets, certainly not the situation in the present case. Further, the debates, particularly in the House, evidence a deep concern over the possible effect of the Act on intrastate commerce. Representative Summers of the State of Washington, principal House sponsor of the bill, stated that, in the opinion of those who had examined it, the bill would *not* interfere with intrastate transactions (see generally, 1930 Congressional Record—House pp. 8537-8557).

The concern by those House members may be well-founded if Respondent's construction of the interstate commerce provisions of the Act is permitted to stand, because the decision effectively permits the jurisdiction of the Secretary of Agriculture to extend to the very situations members of Congress feared it would.

3. The Court Of Appeals Deference To Administrative Construction Is Misplaced

Respondent vigorously argued below that its construction of the interstate commerce provisions of the Act should be accepted under the principal that deference should be paid to the construction of the statute by the administrative agency which administers it.

In the absence of an opinion, it is impossible for Petitioner to know whether the Court of Appeals found this argument persuasive, or relied on it in any way. However, in light of the fact that Respondent's position appears to be clearly erroneous, it would seem logical to assume that the court below did rely on the rule of deference in reaching its decision.

Petitioner is, of course, cognizant of the fact that the principle of deference to an agency's construction of a statute which it administers has long been part of our jurisprudence. The judicial practice of according deference to agency interpre-

tations of law can be traced to the earliest days of the Republic. See *United States v. Vougll,* 9 U.S. (5 Cranch) 368 (1810). Certainly, by the turn of the century the principle was fully developed by this Court, *United States v. Moore,* 95 U.S. 760, 24 L.Ed. 588 (1878); *Hastings & D.R. Co. v. Whitney,* 132 U.S. 357, 10 S.Ct. 112, 33 L.Ed. 363 (1889); *Heath v. Wallace,* 138 U.S. 573, 11 S.Ct. 380, 34 L.Ed. 1063 (1891); *Webster v. Luther,* 163 U.S. 331, 16 S.Ct. 963 41 L.Ed. 179, (1896); *United States v. Hammers,* 221 U.S. 220, 31 S.Ct. 593, 55 L.Ed.2d 710 (1911), and the principle has been consistently reaffirmed by the Supreme Court to the present day. See *Federal Election Commission v. Democratic Senatorial Campaign Committee,* U.S. , 102 S.Ct. 38, 70 L.Ed.2d 23 (1981).

Over the years, however, members of Congress have become concerned that judicial deference to agency interpretations of law has resulted in administrative agencies expanding the scope of their jurisdiction beyond that which Congress intended. This concern was reflected in a bill introduced by Senator Dale Bumpers of Arkansas in 1975, which would have abrogated the principle of deference. Senator Bumper's bill, introduced as Senate Bill No. 67 during the 97th Congress, has now been incorporated as an amendment to Senate Bill No. 1080, The Regulatory Reform Act. Senator Bumper's bill would amend Section 706 of the Administrative Procedure Act (5 U.S.C. §706) to require the reviewing court to "independently...interpret...statutory provisions" and to "hold unlawful and set aside agency action, findings and conclusions found to be...in excess of statutory jurisdiction...." Further, the bill specifically abrogates the doctrine of deference, providing "...the Court shall not accord any presumption in favor of or against agency action...."

Senate Bill No. 1080, including the Bumper's amendment, was passed by the Senate on March 24, 1982. The bill is now pending before the House of Representatives.

In a statement of legislative intent concerning the "no presumption" criterion of subsection (c) of the Bumper's amendment, printed in the Congressional Record—Senate on March 18, 1982 at p. 2406 the Senate stated:

> This prohibition on presumption (of validity of agency interpretation) does not alter the substantive criteria for judicial review under Section 706(a)(2). Those criteria remain uneffected; but the agency's interpretation of a question of law may not be presumed to be correct in determining whether those criteria have been met.

The significance of the proposed amendment to this Court's interpretation of the interstate commerce provisions of the Perishable Agricultural Commodities Act under the facts of the instant case is obvious. A reviewing court would not be obliged, as argued by Respondent to the court below, to follow Respondent's construction of the interstate commerce provisions of the PACA absent a finding that there exists compelling indications that that interpretation is wrong. See *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973). Rather, the Court would be free, and in fact mandated by Congress, to independently interpret the interstate commerce provisions of the Act in light of all available evidence, including the legislative history of the Act and to determine the scope of Respondent's jurisdiction under the facts of the case at bar.

Petitioner is, of course, aware of the clearly erroneous exception to the deference rule, and this Court's teaching that any consideration of the rule of deference must be constrained by the Court's obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history. *Southeastern Community College v. Davis,* 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). However, the rule of deference can and does create an undue burden on litigants where, as here, the reviewing court is confronted with an agency

interpretation of longstanding which has never been tested in the federal courts. For this reason, and in light of the rationale behind the Bumpers Amendment, Petitioner respectfully urges that reconsideration of the rule of deference by this Court is indicated.

4. The Decision Of The Court Of Appeals Adopting The Respondent's Interpretation Of The Statute Is Contrary To The Decisions Of This Court Constructing Similar Statutes

In his decision the Judicial Officer, construing the "interstate commerce" provisions of the Act stated:

> Under the more recent Supreme Court holdings, activities transacted wholly within a state may be subject to regulation under the Commerce Clause if they directly or indirectly burden or obstruct commerce.

This "affecting interstate commerce" argument was also advanced by Respondent before the Court of Appeals. Both the Judicial Officer's decision and Respondent's argument completely miss the point of Petitioner's position with respect to the "interstate commerce" provisions of PACA. The issue raised by Petitioner is not whether Congress has the *power* to regulate intrastate transactions of the type involved in the instant case, but rather whether Congress has *exercised* that power to its fullest extent. As noted *supra,* Petitioner submits that it has not.

There are, of course, numerous examples of statutes passed by Congress wherein Congress has chosen not to exercise its power to its constitutional limit. One example, which is particularly apt for comparative purposes to the case at bar, is in the antitrust area.

It is well settled that the Sherman Act (15 U.S.C. §§1, *et seq.*) confers jurisdiction upon the federal courts over certain activities, including sales of goods, which "affect" commerce.

However, the requirements of the Robinson-Patman Act (15 U.S.C. §13) are much stricter than the "affecting commerce" provision of the Sherman Act.

This Court addressed the "in commerce" requirements of the Robinson-Patman Act (15 U.S.C. §13) in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). In that case defendants produced liquid petroleum asphalt at their wholly-owned subsidiaries and others throughout the Western states. Copp produced asphaltic concrete for its own use and for sale to others.

Copp competed with the subsidiaries of some of the defendants in California, none of which had interstate sales. The materials sold, however, were used in the construction of the interstate highway system. Copp alleged various anti-competitive actions of defendants. This Court denied jurisdiction:

> In contrast to §1, the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions...appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive aquisitions and activities *affect* commerce.

(Emphasis in original.) 419 U.S. 195, 42 L.Ed.2d at 386-7.

Further, it is particularly noteworthy, that Robinson-Patman Act jurisdiction is not conferred over intrastate transactions wherein the products sold in such transactions previously traveled interstate. *Scranton Construction Co., Inc. v. Litton Industries Leasing Corp.*, 494 F2d 778 (5th Cir., 1974), *cert. denied*, 419 U.S. 1105 (1975); *Belliston v. Texaco,*

Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), *reh. denied*, 409 U.S. 1001 (1972).

Petitioner believes that Respondents' reliance on the "affecting interstate commerce" motion is misplaced. As can be seen from the foregoing discussion of the commerce requirements of the Robinson-Patman Act, Congress need not exercise its power to regulate commerce to the fullest extent permitted by the Commerce Clause. Rather than focusing on the Congress' power to regulate the construction of the interstate commerce provisions of the PACA requires the ascertainment of Congressional intent which for the reasons stated, *supra*, was to exclude from the Secretary's jurisdiction transactions of the sort involved in the instant case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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